(2)

FILED
JUN 2 - 2004
OFFICE OF THE CLERK

No. 03-799

In The

Supreme Court of the United States

THE STATE OF NEVADA,

Petitioner,

v.

GREG R. TABBADA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Nevada

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THOMAS W. GREGORY, ESQ.
521 Gordon Avenue
Reno, NV 89509
(775) 786-7665
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATEMENT OF THE CASE[1]

The following facts are in addition to those stated in the Petition:

When the police arrived on scene, Tabbada was sitting on a couch. Appendix D-3. Officer Parker had Tabbada stand up and moved Tabbada to the center of the room. Appendix D-4. Tabbada asked if he was going to jail. Appendix E-2. Officer Parker responded, "No. I just need to go outside and talk with you." *Id.* Officer Parker had Tabbada go outside with him and had Tabbada sit on the porch. Appendix D-5.

Approximately 15 minutes later, Officer Parker had Tabbada stand and proceeded to place him into handcuffs. Appendix D-5, E-6. Officer Parker told Tabbada he was not under arrest but that he was being detained. Appendix E-6. Officer Parker did not tell Tabbada why he was being detained. *Id.* Per Officer Parker, Tabbada was not free to leave. Appendix D-10.

Officer Parker interrogated Tabbada. Appendix E-6-8. Sergeant Morton approached Tabbada and asked if he would be willing to go to the station to talk to a detective. Appendix E-8. Tabbada responded, "What time? Right now?" *Id.* Sergeant Morton said, "Yeah. You understand the mom's not here, okay. (Unintelligible) without the mom so I need your help. Okay?" Appendix E-8-9. Tabbada responded, "Okay." Appendix E-9.

---

[1] For the purposes of this brief, Respondent adopts Appendixes A-F of the Petition.

Officer Parker placed Tabbada into a police car. Appendix D-7-8, Appendix E-12. Officer Parker told a fellow officer, "I'm not sure how well he (Tabbada) understands the English language." Appendix E-14.

REASONS FOR DENYING THE WRIT

I

In reaching its conclusion that Tabbada was in custody the moment he was handcuffed, the Nevada Supreme Court utilized the test set out in *Berkemer v. McCarty*, 468 U.S. 420, 422 (1994), i.e., "how a reasonable man in the suspect's position would have understood his situation." Appendix A-3, quoting *Alward v. State*, 112 Nev. 141, 154, 912 P.2d 243, 251 (1996) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 422 (1994)).

The Petitioner requests that the Court give further definition to this rule by requiring courts to view the totality of the circumstances when faced with a custody issue, with no one factor being controlling. Petition, 6. The Nevada Supreme Court already adopted such a rule, *Alward v. State*, 112 Nev. 141, 912 P.2d 243 (1996), and applied the rule to Tabbada's circumstances. Appendix A-3-4.

The Petitioner's problem is not the rule itself but rather the manner in which the rule was applied by the Nevada Supreme Court. Specifically, the Petitioner takes issue with the weight applied by the Nevada Supreme Court to the fact that the defendant was handcuffed without justification. Petition, 7. A petition for writ of certiorari is "rarely granted" where the alleged error

consists of "the misapplication of a properly stated rule of law," United States Supreme Court Rule 10. In any event, the Nevada Supreme Court did not misapply the rule as the Court properly weighed the totality of the circumstances in reaching its conclusion that Tabbada was in custody.

II

The second issue presented in the Petition has never been addressed by this Court: whether the custodial status of a suspect may revert to non-custodial status for the purpose of *Miranda* and, if so, under what circumstances. For the following reason the Petition should be denied as to this issue.

The Petition states that "the Nevada Supreme Court has erred by ruling that a defendant's custodial status may not evolve into a non-custodial status." Petition, 8. By stating skepticism that transformation from custodial to non-custodial status "can so readily occur," Appendix A-7, however, the Nevada Supreme Court did not rule that custodial status can never evolve to non-custodial status. *Id.*

In this case, the Nevada Supreme Court viewed the totality of the circumstances and cited specific facts in correctly concluding that Tabbada's custodial status did not evolve into non-custodial status. Appendix A-8. The Petitioner takes issue with the factual findings of the Nevada Supreme Court, Petition, 11-12, but a petition for certiorari is "rarely granted when the asserted error consists of erroneous factual findings . . . " United States Supreme Court Rule 10.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted.

THOMAS W. GREGORY, ESQ.
521 Gordon Avenue
Reno, NV 89509
(775) 786-7665
Counsel for Respondent